

Honorable Robert J. Bryan

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA**

Angela Kee
5312 S. Cedar St.
Tacoma, WA 98409

and

Angela Gustin
7827 S. Ainsworth Ave.
Tacoma, WA 98408

Plaintiffs,

v.

Evergreen Professional Recoveries, Inc.,

Defendant.

No. C09-5130 RJB

DEFENDANT'S MOTION FOR
FEES AND COSTS

NOTED FOR FRIDAY
SEPTEMBER 11, 2009

Comes Now, Evergreen Professional Recoveries, Inc., and moves for the following relief:

DEFENDANT'S MOTION FOR
FEES AND COSTS - 1
CASE NO. C09-5130 RJB

Luke, Casteel & Olsen, PSC
3400 188th Street SW, Suite 484
Lynnwood, WA 98037
425-744-0411
425-771-3490 (Facsimile)

**I.
RELIEF REQUESTED**

On August 19th, this court granted Evergreen's Motion for Partial Summary Judgment dismissing of all of Plaintiff Kee's claims. Dkt. #18 Evergreen now requests attorney fees and costs pursuant to Rule 11, 15 U.S.C. § 1692K and FRCP 54(d)(2).

**II.
AUTHORITY**

A. Fees under §1692K

Plaintiff Kee sued Defendant under the FDCPA, which provides:

On a finding by the court that the action under this section was brought in bad faith and for the purpose of harassment, the court may award to the defendant attorney's fees reasonable in relation to the work expended and costs.

15 U.S.C. § 1692K(a)(3)

Plaintiff Kee knew, at the time she filed this FDCPA action, that she had already filed a Chapter 7 Petition which did not disclose to the Court, Trustee or her creditors that she alleged a \$10,000 damage claim against Defendant. Moreover, she

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1 made no attempt to amend her schedules until after she received a discharge and
2 Defense counsel requested she dismiss voluntarily. Finally, she failed to dismiss her
3 claims voluntarily, yet did not submit an affidavit or declaration showing inadvertent
4 error or a good faith reason for her conduct.
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6 The Court should award fees to Defendants under §1692k(a)(3) based on Kee's
7 bad faith filing of her FDCPA claims and refusal to voluntarily dismiss.
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9 B. Fees under Rule 11
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11 Rule 11(b) of the Federal Rules of Civil Procedure requires that in all
12 representations to the court an attorney conduct "an inquiry reasonable under the
13 circumstances." FRCP 11(b). Under Rule 11, a court can impose an "appropriate
14 sanction upon the attorneys, law firms or parties." FRCP 11(c).
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16 Rule 11 also provides that attorneys presenting pleadings, motions or other
17 papers (i.e. response and reply briefs) are "certifying that to the best of the person's
18 knowledge, information and belief" that the documents are not being presented for an
19 improper purpose, such as . . . to cause unnecessary delay or needless increase in the
20 cost of litigation, [FRCP 11(b)(1)] and further certifying that "the allegations and other
21 factual contentions have evidentiary support[.]" FRCP 11(b)(3).
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1 The record herein contains ample evidence that (1) this suit was filed without
2 sufficient inquiry by FDCPA counsel as to whether Ms. Kee had disclosed her claims
3 to the bankruptcy court, (2) Legal Helpers, P.C. was the law firm assisting Ms. Kee
4 with her Bankruptcy as well as this FDCPA case, (3) Ms. Kee made contradictory
5 representations to two different courts, and, most egregious (4) Ms. Kee and her
6 counsel chose to keep perpetuating the misrepresentation after receiving Defense
7 counsel's letter requesting dismissal, and even after the summary judgment motion was
8 filed.
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12 It is this last conduct that is the most troubling: Defense counsel gave Ms. Kee's
13 counsel written notice in June that Defendant would request fees pursuant to Rule 11
14 if Kee's claims were not voluntarily dismissed. Dkt. #15, Ex. 4. Ms. Kee and her
15 counsel should have voluntarily dismissed her claims, or, her counsel should have
16 withdrawn rather than proceed with discovery and opposition to the motion.
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19 In response to that letter, Amended Schedules were filed in her closed
20 bankruptcy case. Kee then prepared and served discovery. Decl. of Counsel in
21 Support of Fees and Costs, Ex. 1.
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23 By refusing to voluntarily dismiss, serving discovery, filing amended schedules
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1 and opposing the Motion for Summary Judgment, Ms. Kee and her counsel caused
2 Defendant to incur an additional \$2,609.00 in attorney fees. A total of \$3,198.64 in
3 attorney fees and costs has been incurred through August 19, 2009; and another
4 \$570.00 has been incurred preparing this motion.
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6 In *Terran v. Kaplan*, 109 F.3d 1428 (9th Cir., 1997), the Ninth Circuit upheld
7 a district court's order awarding fees and costs pursuant to Rule 11. In *Terran*, the
8 Plaintiff had filed his claims without the reasonable inquiry required. By doing so,
9 Kaplan was compelled to prepare a defense to the invalid claims; Rule 11 sanctions
10 were therefore proper. *Terran*, 109 F.3d 1428.
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12 Similar to *Terran*, Kee's claims should not have been filed in light of the
13 original bankruptcy schedules demonstrating no claims or suits. This should have been
14 known to counsel as Legal Helpers, P.C. represented Kee in both cases. Moreover,
15 once the June notice was served on Kee's counsel, counsel had a duty to make
16 reasonable inquiry before continuing with Kee's claims. Instead of dismissing or
17 withdrawing, both Ms. Kee and her counsel actively pursued the inconsistent positions
18 serving discovery and opposing the Motion for Partial Summary Judgment.
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23 Notably, only a self serving declaration of counsel was offered in opposition to
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1 Summary Judgment, which nonetheless forced Defendant to prepare and file a Reply.

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3 **III.**
4 **CONCLUSION**

5 Defendant requests attorney fees pursuant to §1692K and Rule 11 in an amount
6
7 to be determined by this court.

8 DATED THIS 27th day of August, 2009.

9
10 LUKE, CASTEEL & OLSEN, PSC

11 /s/ Kimberlee Walker Olsen
12 Kimberlee Walker Olsen, WSBA # 28773
13 Attorney for Defendant
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27 DEFENDANT'S MOTION FOR
28 FEES AND COSTS - 6
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CERTIFICATE OF SERVICE

I, Kimberlee Walker Olsen, certify that on August 27, 2009, I electronically sent, via ECF, true and correct copies of:

1. Defendant's Motion for Fees and Costs/Note on Motion Calendar;
2. Declaration of Defendant's Counsel in Support of Fees and Costs; and
3. [Proposed] Order Granting Defendants' Motion for Fees and Costs

to the following:

Lawrence S. Lofgren, Richard John Meier
Legal Helpers
llo@legalhelpers.com
rjm@legalhelpers.com

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DEFENDANT'S MOTION FOR
FEES AND COSTS - 7
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